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NO. 84-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

IN THE MATTER OF THE SANCTION

OF

JAY C. BAKER and MICHAEL J. CARSON

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE 10TH CIRCUIT

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QUESTIONS PRESENTED

1. Whether summary punishment may be imposed upon an attorney without granting him an opportunity to be heard.

2. Whether an attorney may be summarily disciplined when he has violated no order of court.

3. What are the guidelines which limit or control the power of a court to summarily discipline or "sanction" attorneys who are not contemptuous.

4. Whether Rule 16 of the Federal Rules of Civil Procedure authorizes summary discipline of attorneys for conduct which imposes no expense or inconvenience upon any other party and which occurred prior to the adoption of such rule.

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NO. 84-

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Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TO THE 10TH CIRCUIT

The petitioners, Jay C. Baker and Michael J. Carson, ask that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

CITATION TO OPINION BELOW

The en banc opinion on rehearing of the United States Court of Appeals for the Tenth Circuit is reported in In the Matter of the Sanction of Jay C. Baker and Michael J. Carson, not yet reported, (10th Cir. 1984), and is attached hereto as Appendix A. The panel decision filed March 3, 1984, is unreported. After the panel decision reversing the sanctions, the Court of Appeals on its own motion withdrew the panel decision and set the case for rehearing en banc.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered October 3, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1), petitioners having asserted below and asserting herein deprivation of rights secured by the laws and Constitution of the United States.

CONSTITUTIONAL, STATUTORY AND RULES INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides in relevant part:

> No person . . . be deprived of life, liberty, or property, without due process of law . . .

It also involves Rule 16(f) of the Federal Rules of Civil Procedure, effective August 1, 1983:

> (f) If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or his own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37 (b)(2)(B), (C), (D), In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

STATEMENT OF THE CASE

On March 5, 1983, there was filed in the United States District Court for the Northern District of Oklahoma a civil action styled George Roland Mulvaney vs. Rivair Flying Service, Inc. After the action was filed Rivair Flying Service, Inc., made Ed Dietlin, d/b/a Dietlin Aircraft a third party defendant. The plaintiff was represented by petitioner Jay C. Baker; the defendant by Mr. Rabon Martin, and the third party defendant by petitioner Michael J. Carson. The case proceeded through the normal pre-trial motions without incident.

This case was originally scheduled for trial on September 20, 1982. This trial setting was stricken at the request of the third party defendant, Dietlin, who filed a Motion for continuance in late July, 1982. This motion was

granted for reasons personal (a religious holiday) to the attorney for the third party defendant. The case was continued for trial until January 17, 1983.

During January, both the defendant and the third party defendant filed motions for a continuance. The defendant Rivair asked for a continuance because its attorney, Mr. Rabon Martin, was scheduled to take a ski trip to Innsbruck, Austria. The third party defendant asked for a continuance because he had been unable to obtain the deposition of a mechanic who was to testify for the plaintiff. When the case was called for trial, Mr. Paul Brunton appeared for Mr. Martin, who was skiing in Austria. At the call of the docket on January 17, the following occurred:

> THE COURT: The next case to be tried is 81-C-85, George Roland Mulvaney vs. Rivair Flying Service, et al.

MR. BAKER: If the Court please, the plaintiff is ready, Your Honor.

MR. CARSON: I represent the third party defendant, and as Your Honor knows we do have a motion for continuance pending.

THE COURT: Yes.

MR. BRUNTON: If the Court please, I am here for Mr. Martin.

THE COURT: All right. And who is your client? Who is your client, who do you appear on behalf.

MR. BRUNTIN: On behalf of Rivair itself, Your Honor.

THE COURT: All right, very well. And how many days to you estimate, Mr. Baker?

MR. BAKER: My case will take about four hours. How long -- what they have I don't know.

THE COURT: Any estimate?

MR. CARSON: I would estimate an additional day between us, Your Honor.

THE COURT: All right. Now the Court does have a motion for continuance filed by Mr. Carson on behalf of Dietlin Aircraft, third party defendant. The basis of the motion which was filed January 13, 1983, states that the movant has been unable to take the deposition of a key witness who is expected

to testify in this case and the motion has attached to it an affidavit. This docket has been set for some time. This is a 1981 case and the motion was filed on January 13, which is less than the prescribed time for filing the motion. I will not deny the motion on the grounds of that alone, but that gives the Court at least some primary attitudinal problem and I will deny the motion for continuance.

I will ask this, if there is any opportunity, since this is the last case on the court's docket, of taking that deposition this week?

MR. BAKER: Your Honor, may I address the Court for a moment?

THE COURT: Yes.

MR. BAKER: In regard to his motion for a continuance I do feel like I have misled the defendant. The witness is a man named Mike Cryder. He is an aircraft mechanic in Houston. I have on several occasions told them I will do my best to get him to Tulsa for a deposition or get it lined out so we could go to Houston and take his deposition. I just haven't been able to do it. I do feel that I have really misled counsel. He should have had the deposition and it's probably my fault that he hasn't. I know he could get out notices and subpoena and take the man's deposition, but we tried to do it agreeably so we could all go to Houston at our convenience rath-

er than at the time someone decides to give notice. And if Mr. Carson says that he is not ready I am sure he is not. I have no objection to a continuance if you wish.

Mr. Brunton: If the Court please, also in regard to Mr. Martin's motion, I believe you overruled that though last week. I know it's probably not a legal motion as such, but it is on file.

THE COURT: I know it's on file and it reflects that Mr. Martin has an opportunity for a ski trip to Europe.

MR. BRUNTON: I know, and I wish I was at Innsbruck and he was here.

THE COURT: Yes, I somehow question his fortitude in sending you, Mr. Brunton, and I further question your judgment in coming.

MR. BRUNTON: I know. He owes me several now.

THE COURT: That's right. Well, plaintiff is saying that he misled and there seems to be legitimate grounds.

MR. CARSON: We will so stipulate, Your Honor.

MR. BAKER: I thought we could do it by agreement and I called him on a couple of occasions. Mr. Carson could go one time and then Rabon couldn't go. Then I couldn't locate the mechanic in Houston. He had moved.

THE COURT: Do you know where he is now?

MR. BAKER: Yes, I have talked to him.

THE COURT: All right. When could you get him up for a deposition?

MR. BAKER: He said he won't come up here but one time. If we want a deposition we have to go to Houston. He will come one time, my choice, trial or deposition. I would rather have him here live at the trial.

THE COURT: All right. Well, this is an interesting problem. I am going to solve it by striking this case from the docket and I am going to assign a sanction of $350 and that will be divided equally between the plaintiff and the third party defendant. You gentlemen can share in that blow.

MR. BAKER: Your, Honor, I announced ready.

THE COURT: No, I understand it, but you did the fair and honorable thing in announcing to this Court—

MR. BAKER: But I didn't know it was going to cost me a hundred fifty bucks.

THE COURT: I know it. Well, that the problem with fairness and honor, it costs. But I will—that will be the order of the Court and will also solicit another member

of your group to join in. I am not ordering it, I think it would be inappropriate, but I think that Mr. Martin should give consideration to anteing up a third of that and we will—

MR. BRUNTON: Judge, I am sure he would be happy to do so.

THE COURT: All right. Very well.

MR. BAKER: I should have gone to Insbruck with Rabon.

THE COURT: That will be the Court's order. You will be stricken from this dockt. Gentlemen, I would suggest this, that I will place you as first on the next trial docket for February.

MR. BAKER: Thank you.

THE COURT: Very well.

MR. BRUNTON: Thank you, Your Honor.

Subsequently, the Court explained the figure of $350, the amount of the "sanction":

BY THE COURT: . . . Now the balance of the cases -- and, gentlemen, just a moment. I will tell you the basis of the order so that it is not done without some knowledge and I'm not doing it as a humorous matter and it's not humorous to you nor is it to the Court. I am doing it because Chief Jus-

tice Burger has estimated the cost of the system, the operation of the system to be $350 per hour to operate the justice system in the United States and it is using that measure that this Court has followed in assessing those sanctions. And a three-way split at least will put enough impetuous [sic] on it to make you remember it and possibly even the rest of the bar.

Thank you, gentlemen. You will be excused.

PRELIMINARY STATEMENT

There is moving across the courtrooms of this country a squall line which may divide the bench and bar, making the trial lawyer an adversarial hack who suffers the slings and arrows of the fancy of the court in the form of summary amercement without a prior audience of the court. Every trial may become also a summary inquisition into the lawyer's preparation; the courtroom may become a no man's land in which a lawyer can be suddenly caponized and dishonored by judicial assertions of

laxity and then forthwith flailed financially. Will the advocate become so fearful of judicial disapprobation that he can no longer perform his task? Has the practice of law come to exact a simpleton's silence to injustice— candor and fairness denied? These questions lie at the core of the problems presented by this Petition: they scream for a resolution of the relative roles and responsibilities of the practicing attorney and the court. The reasons for the "sanction" in this case are obscure, for the comments of the court in "assigning" the fine was less than compendious.

At stake is the independence of the trial bar, the lawyer's freedom to represent his client in the courtrooms of this country. Certiorari should be granted by this Court to clarify and limit this newly exercised power of the trial courts; and this may be one of the few chances this

Court will have to speak upon such a subject, for the cost of pursuing this sanction to this Court certainly is greater than the burden of "bellying up" and paying the fine.

There is a division among the circuit courts of appeal on the power and procedure for such drastic action. An abuse of the power can threaten the very judicial process by rendering the attorney unable to function.

I.
THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A COURT MAY DISCIPLINE AN ATTORNEY FOR CONDUCT OF WHICH HE HAS NO PRIOR NOTICE IS IMPERMISSIBLE

There is disagreement among the courts of appeals who have addressed the issue of summary punishment of the trial lawyer. The Second Circuit in In re Sutter, 543 F.2d 1030 (2nd Cir. 1976) has held that "District Courts have the power,

absent a statute or Supreme Court Rule to the contrary, to promulgate local rules that imposes sanctions for conduct by lawyers that fall short of contempt of court." The Third Circuit in Gamble v. Pope & Talbot, 307 F.2d 729 (3rd Cir. 1962), denied the existence of such power for violation of "standing orders" in civil cases. The Gamble Court held that there was no power to "impose such a penalty for conduct not found to be contemptuous and without the procedural safeguards given by Rule 42 of the Federal Rules of Crim inal Procedure" and the Fifth Amendment. That Court further stated:

> ". . . In the case at bar it was the delay that was being punished, irrespective of its cause. The means employed were beyond the power of the court but the incident did serve to point up the importance of counsel meticulously observing pretrial filing date obligations. In so doing it fulfilled the commendable purpose of the trial judge, i.e., to vividly bring to the attention of . . . the bar that substantial negligence in pretrial practice will not be tolerated. But that com-

mendable purpose with its innocent but palpably erroneous assumption of dictatorial powers over litigation, lawyers and litigants, should not now be seized upon as an opportunity to further the questionable cause of reducing lawyers in a courtroom or within its reach to puppets, completely subject to the whim and warp of the courts.

We are not dealing with the caponizing of a judge. It is not this independence that is being protected by the minority view. What the latter is doing is supporting the tactic of informally inflicting a criminal sanction without charges or hearing; where there was no "actual obstruction of justice" and where counsel belatedly remedied but nevertheless remedied his unfortunate negligence and where the plaintiffs cause was not harmed. What the minority view really attacks is our "vigorous, independent bar." What it really advocates is the complete take over of the trial and its collaterals by the trial judge and appellate courts. It is good to have this out in the open where it can be squarely faced. The effort to concentrate all that frightening power in the bench is too dangerous a potential to let slip by clothed in such disarming language as "simply * * * an exercise in disciplinary authority with no necessary criminal sanction." All that "exercise" happens to be is the first giant step in stripping a lawyer of his independence and leaving him, his client and

> the latter's cause of action to the ukase of the court. Even Jack Cade's solution would have left the lawyer his self-respect.

The courts are evenly divided on their power to impose such fines. J.M. Cleminshaw Co. v. City of Norwich, 93 F.R.D. 338 (Conn. 1981), upholds the power, as does Martinex v. Thrifty Drug and Discount Company, 593 F.2d 992 (10th Cir. 1979). Each of these cases, however, involved violations of published court rules, and the latter expressly granted the offending attorney the opportunity to be heard.

The contempt power is substantially limited by Rule 42 of the Federal Rules of Criminal Procedure and by 18 U.S.C. §401. This Court should grant certiorari to reconcile the conflicts between Rule 42, §402 and Rule 16(f) of the Federal Rules of Civil Procedure, as amended. More specifically, certiorari should be granted to determine whether

Rule 16(f) authorizes punitive fines as in this case or merely the award of expenses against "disobedient or recalcitrant" attorneys, as is indicated in the Advisory Committee's Notes to the 1983 Amendment to Rule 16. The proper distinction between contempt and "sanctions" would appear to be whether the mometary burden inures to the benefit of another party to the action or to the United States. If this is the case, the Advisory Committee's notes that that the "contempt sanction . . . is available only for a violation of a court order." The distinction between the two is a subject upon which the pronouncement of this Court is needed.

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A COURT MAY IMPOSE SANCTIONS UPON AN ATTORNEY WITHOUT GRANTING EVEN A SUMMARY OPPORTUNITY TO BE HEARD.

If penal sanctions are to be the tool of the future to exact continuous diligence from attorneys, there is an imperative need to establish the limit of the powers of the bench and the rights of the bar. In the present case there was an attempt by Mr. Baker to protest when he stated, "Your Honor, I announced ready." Yet the Court made no further inquiry or inquired whether any other reasons existed for the failure to take the deposition of the mechanic. Other reasons did in fact exist which, had they been known to the Court, would probably have mitigated against the imposition of sanctions.

An opportunity to be heard is the hallmark of due process. Anderson

National Bank v. Luckett, 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692 (1944). The employment of "sanctions" to discipline an attorney is but the use of the contempt power under another name. Surely, the law has not reached the point where one need only change the name of a concept to disregard all safeguards which formerly existed. The use of summary sanctions tends to conflict with traditional notions of due process. This conflict should be resolved.

III.

THE COURT SHOULD GRANT CERTIORARI TO ESTABLISH GUIDELINES FOR THE EXERCISE OF DISCRETION IN THE IMPOSITION OF SANCTIONS

Before open season is declared on the trial lawyer or he becomes an endangered species, some guidelines must be established for the imposition of penal sanctions. The opinion of the Court of Appeals upholds the sanctions on the basis

that counsel were negligent, but there is scant evidence of such negligence. It is not necessarily negligence that one of three lawyers cannot attend a deposition in Houston, 400 miles away, at a certain time. Nor is it negligence to take the deposition by agreement rather than by notice. If for failure to have a deposition by trial time, a conclusion of negligence is to be drawn and a fine imposed, there must be guidelines. Otherwise, the power of the judiciary will be awesome and intimidating. At issue is the ability of the trial lawyer to function within the atmosphere of a courtroom. His function should remain one of representation of his client and not appeasement of the court.

IV.

WHETHER RULE 16 OF THE FEDERAL RULES OF CIVIL PROCEDURE AUTHORIZE DISCIPLINING AN ATTORNEY FOR CONDUCT SUCH AS OCCURRED IN THIS CASE.

Rule 16(f) authorizes sanctions reimbursing any other party to litigation for expenses incurred because of noncompliance with the rule; but it does not authorize a fine to payable to the U.S. Treasury, as though it were a fine in a criminal case. This Court should grant certiorari for the purpose of delineating the scope of Rule 16)f), and the nature of "sanctions" which may be imposed.

The Court should also grant certiorari to determine whether Rule 16 has any retroactive application as the opinion of the Court of Appeals would impliedly have one believe.

CONCLUSION

For the reasons set forth herein, the petitioners ask that a writ of certiorari be granted.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

IN THE MATTER OF THE SANCTION

OF

JAY C. BAKER and MICHAEL J. CARSON

APPENDIX

Before HOLLOWAY, SETH, BARRETT, DOYLE, McKAY, LOGAN, SEYMOUR, and McWILLIAMS, CIRCUIT JUDGES

McKAY, Circuit Judge

FILED
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After the panel decision in this case, the court determined to consider in banc some of the growing number of sanctions cases. We therefore ordered the recall of the mandate and here consider the issues raised in this case in banc along with D&H Marketers, Inc. v. Freedom Oil & Gas, Inc., Nos. 83-1720 and 83-1841 (10th Cir. ____, 1984), also decided today.

The case out of which this appeal arises was set for trial on January 17, 1983. Not long before trial, the defendant in this three party action sought a continuance for the convenience of coun-

sel. The court indicated, by denying the motion, the urgency of its need to abide with the scheduled jury trial. Thereafter, four days before trial, the third party def ndant moved for a continuance based on a failure to depose a critical witness. That motion was heard on the day scheduled for trial. Counsel for plaintiff, although announcing his readiness for trial, candidly advised the court that he might be responsible, at least in part, for counsel's inability to take the deposition in question. The parties had tried to agree on a mutually acceptable time for the deposition but that effort had failed. In any event, with the trial date approaching and even in the face of the court's previous refusal to grant a continuance because of the absence from the country of chief counsel on one side, the third party defendant had not noticed the deposition or otherwise adequately

anticipated the inconvenience that would be caused by not being ready for trial on the long anticipated and set date with a jury planned. The trial court granted the continuance but imposed a $350 sanction on the attorneys for the plaintiff and the third party defendant because of the seriousness of the problems created for the court. The court did not make a finding that there was bad faith but clearly it was concerned that delays caused by negligent counsel burden the taxpayers and the court system.

The issue in this case is whether the Court abused its discretion by imposing this sanction. See National Hockey League v. Metropolitan HockeY Club, Inc., 427 U.S. 639 (1976). The issue of discretion must not be viewed in isolation. Rather, we must look at the totality of the circumstances, including the specific case under review, the total man-

agement problems for courts, and access and cost problems for litigants. The problems of congested calendar and disgraceful costs of litigation have been so widely discussed that they do not require further documentation. The problems have been encapsulated by the Advisory Committee on Rules in its Notes accompanying the 1983 amendments to Federal Rule of Civil Procedure 16, which governs pretrial management and was amended to alleviate these problems. It is enough to note that the management of cases from the time of filing the complaint until the beginning of trial had become unacceptably long, necessitating amendment of Rule 16. While on the whole Rule 16 is concerned with the mechanics of pretrial scheduling and planning, its spirit, intent and purpose is clearly designed to be broadly remedial allowing courts to actively manage the preparation of cases for trial. Some dis

pute may exist concerning the dichotomy among the various authorities on which the courts may rely for sanctions. See e.g., Federal Rule of Civil Procedure 37, sanctions for failure to make or cooperate in discovery; the court's contempt powers; 28 U.S.C.¢ 1927, counsel's liability for excessive costs; a variety of provisions for award of attorney's fees to prevailing parties; and the inherent power of the court to control its docket and adjudicatory functions. However, there can be no doubt that subsection (f), added as part of the 1983 amendments to Rule 16, indicates the intent to give courts very broad discretion to use sanctions where necessary to insure not only that lawyers and parties refrain from contumacious behavior, already punishable under the various other rules and statutes, but that they fulfill their high duty to insure the expeditious and sound

management the preparation of cases for trial. Indeed, the Rule suggests a different focus and presumption in the administration of sanctions than do the other available sanction provisions. It provides in part:

> In lieu of or in addition to any other sanction, the judge shall require the party of the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 16(f) (emphasis added).

It is clear from the language and the context in which this amendment to the Rule was enacted that neither contumacious attitude nor chronic failure is a necessary threshold to the imposition of sanctions. The intent is to impose the sanction where the fault lies. It is not necessary that the party or the party's lawyer be in violation of a court order

as required for the application of Rule 37(b)(1), Federal Rules of Civil Procedure. Both the text and the Notes of the Advisory Committee make clear that concerns about burdens on the court are to receive no less attention than concerns about burdens on opposing parties.

While the sanctions imposed in this case occurred shortly before the adoption of the 1983 amendments to Rule 16, the spirit and purpose of those amendments have always been within the inherent power of the courts to manage their affairs as an independent constitutional branch of government. See Roadway Express, Inc., v. Piper, 447 U.S. 752, 764-67 (1980); Link v. Wabash Railroad Co., 370 U.S. 626 (1962). Piper held that the court must find bad faith before the sanction of dismissal could be imposed. However, Piper was decided before the amendments to Rule 16 and the sanction imposed

was much harsher than the fine imposed here. We therefore examine the issue of abuse of discretion in light not only of the historic powers of the court but in light of these amendments to Rule 16 as well.

The primary focus of amended Rule 16 is on the mechanics of pretrial conferences and scheduling. The purpose of Rule 16 is to insure early judicial intervention in the process of trial preparation and proper conduct of that entire process. When viewed in its broad remedial context, subsection (e) contemplates its application to all pretrial management orders. Certainly the sanctions concept contained in subsection (f) is a codification of the purpose to insist that the court, the lawyers and the parties abandon habits which unreasonably delay and otherwise interfere with the expeditious management of trial

preparation. There is no reason, either in specific language or logic, for applying sanctions differently to pretrial matters other than the formal conferences defined and expanded in the 1983 amendments to Rule 16.

We are not dealing here with the historic concept of contempt. We are not dealing with the traditional award of attorney's fees as an adjunct of success in litigation. Nor are we dealing with the defiant refusal of an attorney or party to comply with some order of the court, such as discovery. Instead, we are dealing with the matter most critical to the court itself: management of its docket and avoidance of unnecessary burdens on the tax-supported courts, opposing parties or both. The primary purpose of sanctions in this context is to insure reasonable management requirements for case preparation. The secondary purpose is to

compensate opposing parties for inconvenience and expense incurred because of any noncompliance with the reasonable management orders of the court. Of course the trial court has discretion to withhold the award of expenses, including reasonable attorney's fees, on an affirmative finding that the noncompliance was substantially justified or that other circumstances would make the award unjust.

Here, the court had set the case for trial. No one asserts that the parties and their attorneys did not have adequate notice in order to prepare for trial. The record reflects not contumaciousness, but a pattern of negligence. This negligence imposed on the court, on the day trial was scheduled, necessitated the cancelling of the jury trial and either wasting that jury time or trying to reschedule other matters to accommodate the unwarranted delay. As a sanc-

tion message to the lawyers involved, as well as to the bar generally, $175 imposed on each lawyer is certainly modest enough to fall well within the realm of the trial court's broad discretion.

The trial court could have simply denied the continuance and thus the inconvenience of the court. However, this would turn the purpose of sanctions on their head. Apparently the trial court was impressed that the nondeposed witness was of genuine importance to the merits of the third party defendant's cause. To have forced that party to go to trial without the advantage of having deposed that witness would have effectively imposed the sanction on the client. It is clear from the record in this case that the interference with sound management of the court was the fault of the lawyers on whom the sanction was imposed--not their clients. It is the trial court's duty, within the

spirit of its total powers, including Rule 16, to impose sanctions and compensating awards of expenses, including attorney's fees, in a manner designed to solve the management problem. If the fault lies with the attorneys, that is where the impact of sanction should be lodged. If the fault lies with the clients, that is where the impact of the sanction should be lodged. In this case the trial court lodged the impact of the sanction precisely where it should have, and in modest terms appropriate to the circumstances. There are a broad range of sanctions available to the trial court, but they should be administered and tailored in a manner designed to effectuate the purpose of the sanction and in order of their seriousness as sound discretion dictates.

The trial court's determination of the amount of the sanction apparently was based on the estimated expense to the

court. However, the context of the trial court's order makes clear that its concern was to get across the message which sanctions are designed to portray--the imperative of expeditious management of preparation of cases for trial. The language of Rule 16(f) is in terms of "reasonable expenses." The Rule does not require that those reasonable expenses be only those of opposing parties. While this may be an issue in future cases, we do not find it necessary to rule on that potential issue here. We do not believe that the cost of the court's inconvenience is a precise measure to be routinely awarded in each and every case of unwarranted delay. At the same time, we do not think that cognizance of the costs imposed upon the judicial systam are irrelevant in determining the seriousness and extent of the sanction appropriate in particular cases.

We have indicated elsewhere that preclusive sanctions require more serious default than is present in this case. D&H Marketers, Inc. v. Freedom Oil & Gas, Inc., Nos. 83-1720 and 83-1841 (10th Cir. ___, 1984); Hollis v. United States, No. 82-1780, (10th Cir. ___, 1984). We have also indicated that, as in this case, the trial court should set forth in the record the justification for the sanctions imposed. See Hollis v. United States, slip op. at 8. While the record is not as explicit as it could be, we believe that the context is clear enough to understand the trial court's justification for imposing the sanction. Since both of those standards are satisfied in this case and the sanction imposed is well within the record and the discretion of the trial court, we affirm.

Judge McWilliams dissents:

I respectfully dissent and would adhere to the Order and Judgment of the panel heretofore filed in the instant case on March 13, 1984. Insofar as the record is concerned, the trial judge imposed santions [sic.] without giving any reason. The trial judge did state that the amount of the "fine" or "sanction" was based on a statement made by the Chief Justice in a speech at an A.B.A. meeting.

In sum, the record does not support the action taken by the trial judge, and, in my view, the majority has filled in the gaps.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

IN THE MATTER OF THE SANCTION OF JAY C. BAKER and MICHAEL J. CARSON, Appellants.	)	FILED Mar 13 1984
GEORGE ROLAND MULVANEY, Plaintiff-Appellant, v. RIVAIR FLYING SERVICE, INC., Defendant, v. ED DIETLKIN, d/b/a DIETLIN AIRCRAFT, Third Party Defendant-Appellant.	)	No. 83-1246 (D.C.No. 81-C-85) (N.D. Okla.)

ORDER AND JUDGMENT

Before MCWILLIAMS, BARRETT and DOYLE, Circuit Judges

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); Tenth Cir. R. 10 (e). The cause is therefore ordered submitted without oral argument.

This is an appeal from an order of the district court which imposed a "fine" or a "sanction" in the amount of $350 against two attorneys, said amount to be divided equally between the two. Both attorneys appeal. We reverse.

George Mulvaney, by and through counsel, brought a negligence action against Rivair Flying Service. The latter filed a third party complaint against Ed Dietlin, doing business as Dietlin Aircraft. Four dayus prior to trial, counsel for the third party defendant moved for a continuance. This

matter was heard when the case came on for trial. The basis for the request for a continuance was the inability of counsel for the third party defendant to take the deposition of a key witness for the plaintiff. Counsel for the plaintiff, though announcing his readiness for trial, candidly advised the court that he might be responsible, at least in part, for counsel's inability to take the deposition in question. Plaintiff's counsel stated that he and counsel for the third party defendant had tried to agree upon a mutually acceptable time for taking the deposition, but that one proposed date was unsatisfactory to him, and a second was unacceptable to opposing counsel. When they agreed upon a date, plaintiff's counsel stated that he was unable to locate the witness, who had moved his residence, but that the witness had since been located and would testify at trial.

Based on the recitations set forth above, the district court granted the third party defendant's request for a continuance and imposed what the district court characterized as a "sanction" against counsel for the plaintiff and counsel for the third party defendant in the amount of $175 each.

In this court, the only brief filed is on behalf of the two appellants, which puts this Court at a disadvantage since the appeal is not adversarial in nature. Be that as it may, we note that in imposing the sanction the district court made no reference to any local rule of court which would opermit the sanction. See Martinez v. Thrifty Drug and Discount Company, 593 F.2d 992 (10th Cir. 1979). Nor was any reference made by the district court to 28 U.S.C.§1927, which permits a court to tax the excess "costs" of a proceeding against a lawyer who multiplies

court proceedings vexatiously. The present case would not appear to come within the purview of §1927. United States v. Blodgett, 709 F. 2d 609 (9th Cir. 1983); Overnite Transportation Co. v. Chicago Industrial Tire Co., 697 F.2d 789 (7th Cir. 1983); and United States v. Potamkin Cadillac Corp., 697 F.2d 491 (2d Cir.), cert. denied, 103 S. Ct. 3128 (1983).

This is not the case to consider the inherent power of a court to impose sanctions in general on litigants or their counsel. For a discussion of the inherent power of a court to impose sanctions for the purpose of maintaining orderly administration of justice and the authority of the court, see Roadway Express, Inc.v. Piper, 447 U.S. 752 at 764-67 (1980). For our purposes, it is sufficient to hold that the court in the instant case abused its discretion. Certainly there is not misconduct on the part of counsel

in simply asking for a continuance. It would have been preferable for the district court to either deny the request, or simply grant it. However, in granting the request, and then, in effect, penalizing counsel for making the request, the court, in our view, acted arbitrarily. By disposing of this appeal on the basis of an abuse of discretion, we are not thereby implying that the proceedings were free from procedural defects.

The Judgment and Order imposing a sanction in the amount of $350 on Jay C. Baker and Michael J. Carson is reversed and the matter is remanded with directions that the district court vacate its order.

s/ Howard K. Phillips
Howard K. Phillips, Clerk

No. 83-1246 - IN THE MATTER OF THE SANCTION OF JAY C. BAKER AND MICHAEL J. CARSON BARRETT, Circuit Judge, dissenting:

I would affirm the $350.00 sanction imposed upon respective counsel, $175.00 to each, arising out of their failure to have deposed a particular witness, such failure having been announced in open court on the very day the case was set for trial.

There was no bad faith on the part of counsel, but the failure in this case nevetheless interferred with the district court's inherent power to insure the orderly and efficient exercise of its jurisdiction necessary for the administration of justice. Just as the courts have been held to have the inherent power to determine and compel payment of money reasonably required to carry out its mandated responsibilities in the administration of

justice, Commonwealth ex rel. Carroll v. Tate, 442 P. 45, 274 A.2d 193 (1971), cert. denied, 402 U.S. 974 (1971); Courts, §§ 78, 79, Am. Jur.2d, Vol. 20, so, too, the court has inherent power to punish abuse of its proces by dismissal of an action in the interest of orderly administration of justice. Joseph Bancroft & Sons v. Shelley Knitting Mills, Inc., 245 F. Supp. 523 (D.D. Pa. 1965). The inherent power of a court to prevent or punish abuse of established process is not an exercise of the contempt processes. It is intended to punish abuse of its process. United States v. Powell, 379 U.S. 48 (1964); Gumbel v. Pitkin, 124 U.S. 131 (1888). Such power cannot be thwarted by statutes or procedural rules which interfere with the paramount obligation of a court to protect the purity of its own processes. Pueblo de Taos v. Archulet, 64 F.2d 807 (10th Cir. 1933).

In the instant case, the third-party defendant, on the day of trial in open court, requested a continuance of the case because of his failure to obtain the deposition of a witness for the plaintiff, a mechanic residing out-of-state. Counsel for the plaintiff, Mr. Baker, whose integrity and hosenty is in no way challenged here or in the trial court, forthrightly stated to the court that counsel for the third-party defendant had been misled by him relative to taking the deposition. This statement followed the trial court's denial of the third party defendant's motion for continuance. The trial of this case had been set on the court's docket for jury trial on January 17, 1983. Two motions for continuance were filed in January, apparently on the eve of trial. The defendant moved for continuance because chief counsel had taken a trip to Innsbruck, Austria, to ski. This motion was

denied and other counsel appeared. The plaintiff's counsel, Mr. Baker, announced that plaintiff was ready for trial, but when the court considered the third-party defendant's motion for continuance based upon failure to depose the mechanic, it was plaintiff's counsel who primarily "shouldered the blame" for the delay. However, counsel for the third-party defendant could have noticed the taking. The respective attorneys had attempted to work out an "agreeable" time and place. The trial judge recognized this. He did not find the attorneys in contempt, and he did not find that they had proceeded in bad faith or willfully. He did find, however, that they had cost the justice system lost time and expense. Judge Ellison's explanation of the $350.00 sanction was:

> . . . gentlemen, just a moment. I will tell you the basis of the order so that it is not done without some knowledge and I'm not doing it as a humorous

> matter and its not humorous to you nor is it to the court. I am doing it because Chief Justice Burger has estimated the cost of the system, the operation of the system to be $350.00 per hour to operate the justice system in the United States and it is using that measure that this Court has followed in assessing those sanctions and a three-way split [the Court suggested that counsel for the defendant ante up] at least will put enough impetuous [sic] on it to make you remember it and possibly even the rest of the bar.

I do not read anything in Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980), or any other case holding that the sanction imposed was not within the inherent power of the trial court to control its own docket and assess court time to parties who, even though not in bad faith, nevertheless interfere with the orderly operation of the system. Link v. Wabash R.Co., 370 U.S. 626, 632 (1962), was cited in Roadway Express for the "well acknowledged" inherent power of a court to levy sanctions in response to abusive

litigation practices. The trial court in the instant case determined to get the word to the bar that such practices would cost the hourly equivalent of the operation of the justice system. I respectfully suggest that the trial judge did not abuse his discretion.

I would affirm.

No. 81-C-85-E

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
1-13	31	MOTION of third party deft for continuance of J/T, w/ affid. of Michael J. Carson.
1-17	MIN:	Called for J/T. Court strikes from dkt & imposes sanction of $350.00 divided between Pltf. & 3rd pty deft. Case is reset on 2-1 4-83, 9:30 a.m.
1-17	32	ORDER that 3rd pty defts mot/continuance is granted & trial to commence on 2-14-83 @9:30 AM.

(2)

84-881

Office - Supreme Court, U.S.
FILED
MAR 15 1985
ALEXANDER L. STEVAS.
CLERK

No. 84-

In the Supreme Court of the United States

OCTOBER TERM, 1984

IN THE MATTER OF THE SANCTION

OF

JAY C. BAKER AND MICHAEL J. CARSON

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Patricia Neel
Senior Law Clerk
Judge James O. Ellison
333 West Fourth Street
Federal Building
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March, 1985

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No. 84-

In the
Supreme Court of the United States

OCTOBER TERM, 1984

IN THE MATTER OF THE SANCTION
OF
JAY C. BAKER AND MICHAEL J. CARSON

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On January 23, 1985 Respondent United States District Court for the Northern District of Oklahoma received a letter request for response to Petition for Writ of Certiorari from the Clerk of the Supreme Court. No response was requested by the Tenth Circuit Court of Appeals, the proceeding having been characterized as nonadversarial. This is therefore the first opportunity for the District Court to raise or respond to issues of fact and law.

Respondent United States District Court for the Northern District of Oklahoma respectfully submits that a writ of certiorari should not issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered October 3, 1984.

OPINION AND ORDER BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit in this case is set forth in Appendix A, pages A-1 et seq., to the Petition for Writ of Certiorari.

JURISDICTION

The jurisdiction of this Court is sought to be invoked under 28 U.S.C. § 1254(1) pursuant to Petitioner's having asserted below and asserting herein deprivation of rights secured by the laws and Constitution of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Respondent takes exception to Petitioner's characterization that this case turns upon either the 5th Amendment to the Constitution or Rule 16(f) of the Federal Rules of Civil Procedure, effective August 1, 1983 and submits relevant inquiry by this Court should begin with the following authority:

RULE 83 OF THE FEDERAL RULES OF CIVIL PROCEDURE

> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

RULE 4 OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ATTORNEYS

> (j) **Discipline.** Any member of the Bar of this Court guilty of a violation of the prescribed oath of office, or of a violation of the disciplinary Rules set forth in the Code of Professional Responsibility of the American Bar Association, or of any conduct unbecoming a member of the Bar of this Court, shall be subject to reprimand, suspension, disbarment, or such other disciplinary action as the Court deems appropriate.

(1) **Summary Discipline.** For misconduct in the presence of the Court, an order may issue forthwith administering such discipline as the Court deems appropriate, including a fine of not to exceed five hundred dollars ($500.00) or confinement of not to exceed six (6) months, but summary discipline shall not include the right of the Court to suspend or disbar the offending lawyer from practicing in this Court. An attorney summarily disciplined as herein provided may appeal any punishment imposed hereunder to the remaining Judges of the Court sitting *en banc*. The Judge administering the discipline shall not sit in the hearing of such an appeal. In order to allow such an appeal, the discipline imposed will, upon request of the attorney, and by his posting a supersedeas bond in a reasonable amount to be fixed by the Judge, be stayed for seven (7) days to allow such attorney to perfect an appeal to the remaining Judges of the Court. If no written appeal be filed within said seven (7) days, the punishment so imposed shall be forthwith administered unless in the interim the Judge imposing same has rescinded or modified his original action. Nothing herein provided is intended to preclude the right of the disciplined attorney to appeal direct to the Court of Appeals for the Tenth Circuit.

. . . .

(3) **Disciplinary Procedure.** Proceedings to discipline a member of the Bar of this Court, except as set forth in paragraphs (1) and (2) hereof, shall be upon an order to show cause issued by the Court, reciting the charges and fixing notice of the date of hearing (which shall not be less than thirty (30) days from the date of the notice), and reciting the place of the hearing and such hearing procedures as may be reasonable and consistent with due process. Notice to the attorney shall be made by personal service or by Registered or Certified Mail, addressed to the respondent-attorney at his last known address. The Court may, in its discretion, refer any Bar disciplinary matter to its Com-

mittee on Admissions and Grievances for proper investigation and recommendation to the Court, either before or after issuance of an order to show cause. The recommendation of the Committee on Admissions and Grievances, if same suggests disbarment or suspension, shall not be adopted until the procedure set forth above has been followed. Any attorney disbarred or suspended pursuant to these Rules may apply to the Court for leave to petition for reinstatement.

The Court may elect to bypass the above procedures and in lieu thereof refer to the Oklahoma State Bar Association any request for disciplinary action against a member of the Bar of this Court.

RULE 12 OF THE LOCAL RULES OF THE NORTHERN DISTRICT OF OKLAHOMA

DEMAND FOR JURY

(d) Settlement *or other deposition [sic] of a case* other than by trial must be given to the Clerk of the Court in writing no less than three (3) full days prior to the jury trial setting. Upon failure to give the required notice, the Clerk will assess jury costs against the parties and counsel, not to exceed thirty ($30.00) for each prospective juror reporting for service. Any monies collected as a result of said assessment shall be paid to the Clerk for transmittal to the Treasury of the United States. (emphasis added)

RULE 11 OF THE LOCAL RULES OF THE NORTHERN DISTRICT OF OKLAHOMA

TIME

The computation of any period of time prescribed or allowed by these Rules shall be in accordance with Rule 6, Federal Rules of Civil Procedure.

RULE 6 OF THE FEDERAL RULES OF CIVIL PROCEDURE

TIME

(a) **Computation.** In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. *When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.* (emphasis added)

RULE 14 OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MOTIONS, APPLICATIONS AND OBJECTIONS

(a) **Briefs.** Each motion, application and objection filed shall set out the specific point or points upon which the motion is brought and shall be accompanied by a concise brief. Memoranda in opposition to such motion and objection shall be filed within ten (10) days after the filing of the motion or objection, and any reply memoranda shall be filed within ten (10) days thereafter. ...

RULE 19 OF THE UNITED STATES DISTRICT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CONTINUANCES

Cases shall not be continued upon stipulation of counsel alone, but such continuances may be allowed only by Order of Court. No such continuances shall be allowed except for good cause shown.

STATEMENT OF THE CASE

Respondent takes exception to Petitioner's Statement of the Case and offers the following chronology of the case as reflected by the Court's docket sheet.[1]

1. On March 24, 1981, Defendant applied for additional time to answer and on March 25, 1981 the Court entered an order extending the time to answer to April 24, 1981. No further extensions were requested.

2. On June 11, 1981, Defendant applied for leave to file answer out of time which order was immediately granted by the Court.

3. On September 30, 1981 the Court by minute order set all preliminary dates in this case as follows: Pretrial hearing, January 14, 1982 at 4:30 p.m.; motions for summary judgment or dismissal, October 30, 1981; discovery cut-off, December 11, 1981; pretrial order, December 16, 1981.

4. On October 30, 1981, Defendant filed motion to bring in third party defendant which was granted.

5. On January 14, 1982 pre-trial hearing was held, at which time discovery was extended to April 2, 1982; motions, agreed pre-trial order and trial briefs were ordered filed by April 9, 1982; final pretrial was set for April 15, 1982; and a jury setting of September 20, 1982 was fixed.

6. On April 9, 1982 Plaintiff and third party defendant filed application for extension of time to complete discovery seven days out of time and without leave of Court.

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[1] The action which gives rise to this appeal was filed March 5, 1981, not 1983 as stated by Petitioners in both the brief submitted to the Tenth Circuit Court of Appeals and the Petition for Writ of Certiorari filed with this Court. At the time the "sanction" was imposed by the District Court, the action had been pending on the Court's docket almost two full years.

7. On April 13, 1982 the Court extended discovery to May 17, 1982 which necessitated the Court, sua sponte, to reset the final pre-trial date and date for filing agreed pre-trial order.

8. On June 10, 1982 final pre-trial was held. Counsel for third party Defendant did not appear and the Court was informed by telephone that the failure to appear was an oversight in docketing by counsel.[2] Counsel present waived imposition of sanctions for the failure to appear and discovery was extended upon oral motion a third and final time until August 6, 1982 in order for third party Defendant to complete certain depositions.

9. On July 27, 1982 third party Defendant moved for continuance of trial date based upon counsel's affidavit indicating a previous committment in Florida which had been set, in part, around counsel's religious Holy Days.[3] Counsel for Defendant Rivair Flying Service, Inc. concurred in the motion stating he also planned to be in Florida on a legal matter. Plaintiffs did not object.

10. On July 29, 1982 jury trial was stricken from the September docket and reset to January 17, 1983, this being the first available realistic docket on which the case could be tried.

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[2]This proceeding was not reported and the Court has no record of whether the phone call was initiated by counsel or by the Court.

[3]The motion is ambiguous in that it does not indicate the precise nature of the "committment" but the Court, based upon counsel's affidavit that family was involved, concluded a vacation was planned.

11. On January 7, 1983, motion of Defendant Rivair for continuance of jury trial was filed because counsel for Defendant Rivair was scheduled to be in Europe during the January trial docket.[4] No objection was filed.

12. On January 11, 1983 the Court denied the motion for continuance but stated that substitute counsel could appear for jury selection.[5]

13. On January 13, third party Defendant filed motion for continuance of thirty days on the grounds that counsel for third party Defendant had been unable to take the depostion of a key witness. No motion to compel discovery had been filed nor motion to extend discovery beyond the Court's previously ordered date of August 6, 1982. Again, no objection was made by any party. Due to the normal docketing procedure, the motion did not come to the attention of the Court until Friday afternoon before Monday morning jury selection by which time the jurors had already been summoned by the Court.

14. On January 17, 1983 at 9:30 a.m. the Court called its jury docket at which time the motion for continuance was raised. The record set forth in Petition for Writ of Certiorari on pages 5 - 11 is an accurate

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[4]There is no mention of a skiing vacation in the motion, however, it was clearly all parties' understanding at docket call that counsels' trip was for that purpose.

[5]The Court holds a two-week trailing jury docket. While counsel did not specify his date of return, his motion indicated he would be in Tulsa in time for the second week of the jury docket.

reflection of the exchange between the Court and counsel. It was during this exchange and after the Court denied continuance that Plaintiff's counsel first confessed partial responsibility for the failure to comply with the Court's discovery order. In response, the Court granted the continuance, but imposed the sanction at issue. As part of the Court's ruling, this case was placed first on the Court's February docket necessitating the Court to rearrange its February docket.[6]

15. No motion to reconsider or clarify or set aside the order was filed or raised in open Court by counsel. Nor was there an attempt to withdraw the motion for continuance. No en banc appeal was taken.

It was in this context that the Court imposed the monetary assessment upon counsel.

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[6] The Court's jury dockets were already filled for the next year, it being the Court's practice to set only the number of cases which can reasonably be reached on any given docket.

ARGUMENT AND AUTHORITY

Respondent, United States District Court for the Northern District of Oklahoma, opposes the issuance of a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Tenth Circuit on the following grounds:

I.

THE SUPREME COURT HAS PREVIOUSLY DECIDED THE FIFTH AMENDMENT DUE PROCESS ISSUES RAISED BY PETITIONER

In *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962) the Court held:

> It is true, of course, that "the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." Anderson National Bank v. Luckett, 321 U.S. 233, 246, 64 S.Ct. 599, 606, 88 L.Ed. 692. But this does not mean that *every order entered without notice and a preliminary adversary hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct.* (Emphasis added)

While *Link* deals with an order of dismissal issued upon the Court's own motion pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, it is illogical to infer that any different standard would be required where less severe sanctions are imposed and where there are specific local rules which afford counsel adequate notice of prohibited acts so as to satisfy due process. See *Ali v. A & G Co., Inc.*, 542 F.2d 595 (2nd Cir. 1976).

The motion for continuance which originally prompted this Court's action was not only filed in an untimely manner in violation of Local Court Rule 12(d) under which the Court has a *duty* to assess a monetary fine of $30.00 per prospective juror called, but was also filed outside of the motion date established by the Court and beyond the spirit and intent of the ten day response time established by Local Court Rule 14. The motion was not preceeded by any prior notice to the Court of discovery problems even though discovery had been closed in this case for more than five months.

The record contains a clear admission in open court by both Petitioners that they failed to follow the discovery deadlines established by the Court. The Petitioner's untimely filing of this motion caused the Court to take the costly step of summoning jurors and making the jury system available to the Petitioners. The filing out of time was expressly contrary to Local Rule 12(d)[7] which requires three full days prior notice of settlement or disposition before jury docket settings.

As in *Link*, Petitioners had the availability of the corrective remedy of Rule 60(b) Federal Rules of Civil Procedure. Additionally Petitioners could have filed a motion to reconsider or clarify and/or an en banc appeal to the District Court pursuant to Local Court Rule 4(j)(1).[8]

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[7] A similar rule was upheld in *Martinez v. Thrifty Drug & Discount Co.*, 593 F.2d 992 (10th Cir. 1979).

[8] Respondents urge in Petition for Writ of Certiorari (p. 18) other reasons existed for the failure to take the deposition of the key witness. The tools were available to counsel to have urged this and it was not the function of this Court to consider what might have been presented.

As in *Link*, Petitioners were aware in advance of the orders of the Court concerning discovery and trial settings. Petitioners cannot complain of unfamiliarity with the procedure for obtaining extensions of time, having invoked the same numerous times during the pendency of this action.

Plaintiffs' counsel, having announced ready, then proceeded to join in the motion for continuance. Under *Link*, the Court had the power at that time to dismiss Plaintiffs' complaint. Alternatively, the Court could have disallowed the testimony of the witness whether or not the motion for continuance was granted or could have entertained a motion, sua sponte, under Rule 37 of the Federal Rules of Civil Procedure. Instead the Court imposed a minimal sanction.

Finally Local Rule 4(j)(1) grants the Court the authority to discipline misconduct of counsel without hearing where the misconduct occurs in the presence of the Court and so long as any fine imposed was not in excess of $500.00. Under the same provision the disciplined attorney is provided due process by immediate right to appeal the decision en banc.

Petitioners were afforded adequate due process within the guidelines of *Link* under all the circumstances of this case and no writ of certiorari should be issued based upon Petitioner's assertions of 5th Amendment violations.

II.

THE TENTH CIRCUIT COURT OF APPEALS CORRECTLY RULED ON THE ISSUE OF THE INHERENT POWER OF THE COURT TO CONTROL ITS DOCKET EVEN THOUGH FACED WITH A NONADVERSARIAL PROCEEDING IN WHICH THE FACTS AND LAW AS RAISED BY PETITIONER DID NOT ACCURATELY REFLECT THE FACTS AND LAW GOVERNING THE CASE

Petition for Writ of Certiorari is unique in the sense that it seeks review of an appellate court decision which was characterized as nonadversarial. Respondent was not represented in the proceedings so the issues of law and fact were before the Appeals Court only upon the characterization given them by Petitioners.

The original appeal to the Tenth Circuit was taken from a transcribed bench proceeding which took place in the middle of the Court's jury docket call.

Petitioners did not request findings of fact or seek clarification of the Court's order. The Tenth Circuit decided the case based upon the inherent power of the Court to control its docket.

A. FACTUAL DISPUTE

Faced in open court with a situation requiring immediate ruling, the trial court was placed in the spontaneous role of jury. Trial Court was not in a position then and is not now to find counsel were perpetrating a fraud on the Court. However, it was clear to the Court from the demeanor of counsel at docket call that counsel announced ready on the expectation that continuance would be granted in spite of the existence of Local Court Rule 19 and the Court's earlier rulings.

After motion for continuance was denied, Plaintiffs' counsel rose to join in the motion, taking partial responsibility for the failure to complete discovery in spite of the fact discovery had been closed for five months. Immediately thereafter Mr. Brunton, appearing for the vacationing counsel for Defendant, reasserted Defendant's previously overruled motion for continuance.

This case had been set for trial for six months and the jury panel was waiting in an adjoining lounge to be called. Counsel's cooperation and comraderie, while commendable in some circumstances, nevertheless placed a substantial and immediate burden on the judicial system. In addition to the unnecessary time and cost expended by the Court, its support personnel and potential jurors, the late hour in which this was raised deprived the Court and other litigants of an opportunity to have cases moved into the reserved time slot.

The record clearly supports a factual inference that there was in this case the proverbial "more than meets the eye" in counsels' actions.

This is not to say that any of the attorneys in this case openly or deliberately misrepresented their pleadings before the Court. There was in the tone of the proceedings, however, a collusion to avoid trial which the system must find unacceptable.

Trial Court's references that Defendant's counsel should be solicited to "ante up" part of the fine can only be read as conveying to the attorneys that the Court understood there were other reasons for the motions besides those appearing on the face of the pleadings. (Petition for Writ of Certiorari, P. 10-11)[9]

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[9]The Court based the amount of sanction on comments by Chief Justice Burger. While accurately included in the Petition for Writ of Certiorari, this is not part of the transcript on file with the District Court.

Mr. Brunton stated that he was sure Defendant's counsel would be happy to contribute to the monetary fine imposed and it is interesting to note that Plaintiff's counsel's immediate comment was that "he should have gone to Innsbruck with Rabon." (Tr. 6).

The Court invited the attorneys to solve the witness problem in the time available before their case would be reached on the trailing docket which would have allowed the case to proceed as scheduled. The obvious unwillingness to do so jumps from the pages of the transcript.

None of these facts were presented or argued before the Tenth Circuit. The Court nevertheless upheld the trial court's ruling.

The one-sided and biased presentation before the Court of Appeals caused certain findings to be made by the Court which would not change the outcome but bars Supreme Court review. For a case to stand as a basis for future precedent surely the facts must be clearly defined and accurately stated.

Petitioners urge the Court of Appeals' decision upholds the sanction on the basis that counsel were negligent and state there is scant evidence of such negligence. This was a factual determination decided against Petitioners based upon Petitioners' own presentation of the record.

The Court of Appeals specifically did not find Rule 37(b)(1), Federal Rules of Civil Procedure, to be applicable because the facts as presented by Petitioners did not indicate any Court order had been violated. In fact, the Court's discovery orders had been blatantly ignored by the apparent collusion of counsel for five months beyond discovery cut-off and numerous infractions of the Local Court Rules appear in the record.

It is not the function of the Supreme Court to unscramble a factual quagmire in order to determine if the issues of the case merit review. *United States v. Johnson*, 268 U.S. 220 (1925).

B. LEGAL BASIS

Further, none of the Local Court Rules of the Northern District of Oklahoma were presented by Petitioners in an effort to fairly present the issues to the Appellate Court. Yet, Petitioners attempt to distinguish this case from those which uphold the power to impose sanctions on the basis that there is a violation of published Court rules where the trial court's actions are upheld. (Petition for Writ of Certiorari P. 16). Had this been raised at the appellate level, the findings of the case would no doubt be more forceful in support of the trial court's actions.

Petitioners assert that the Court should reconcile the conflicts between Rule 42 of the Federal Rules of Criminal Procedure, 18 U.S.C. § 401 and Rule 16(f) of the Federal Rules of Civil Procedure (Petition for Writ of Certiorari P. 16). Respondent simply asserts this is not the case where the conflict is properly raised, either factually or legally. The sanction imposed remedied not an insult to the authority of the Court so as to make the sanction criminal in nature, but rather an insult to the judicial process which Petitioners as officers of the Court are bound to uphold.

Given that the Tenth Circuit made its determination of the issues against Petitioners with only the facts and law presented by Petitioners in a light most favorable to Petitioners, this Court should deny Petition for Writ of Certiorari.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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